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TREATMENT OF EXPORT CREDITS IN WTO DISPUTE SETTLEMENT AND DOMESTIC CVD PROCEEDINGS

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ABSTRACT

Official financing support in the form of export credit has been a controversial issue in international trade. Countries have negated the role of export credit support through direct actions at the WTO, but an interesting issue is whether subsidized export credits which comply with the OECD *Arrangement on Officially Supported Export Credits* can be targeted in a CVD action. The paper seeks to examine this issue in light of the WTO disputes dealing with export credits and other domestic CVD actions concerning export credits.

INTRODUCTION

Export credits are insurance, guarantee or finance arrangements offered by an exporter or by a private or public financial institution in the exporting countries to domestic exporters or foreign buyers of goods or commodities. In sectors such as airline, shipping, and telecommunication equipments export credits have almost become unavoidable as potential buyers shop around for the good and the most favourable financial terms.[2] However, when such export credits are given at interest rates considerably less than market rates, generally, they come under the purview of export subsidies—a category prohibited by the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Export credits are, by and large, contrary to the principle of free trade, as they are considered to upset the level playing field for the domestic producers of the importing country by giving an unfair advantage to the goods of the exporting country.[3] The extent of this unfair advantage increases when a developed countries provides such credits to the buyers of a developing country as it becomes difficult for the sellers of the developing country to compete against the foreign sellers backed with such credits. It is precisely for this reason that a WTO panel in *Canada- Aircraft (Article- 21.5)* observed, "… among the various forms of export subsidies, subsidized export credits arguably have the most immediate and thus the greatest potential to distort trade flows."[4]

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[2] Michelle Ratton Sanchez, *Development Responses to International Trade Legal Game: Examples of Intellectual Property Protection and Export Credit Reforms in Brazil* (2011) (Unpublished manuscript, on file with the author), 64.

[3] Mark D. Fernald, *Export Credits: The Legal Effect of International and Domestic Efforts to Control Their Use*, 7 B.C. INT'L & COMP. L. REV. 433 (1984).

[4] Panel Report, *Canada- Measures Affecting the Export of Civilian Aircraft- Recourse by Brazil to Article 21.5 of the DSU*, 5.137 (Aug. 4, 2000)

The SCM Agreement is the first comprehensive multilateral regulation on subsidies[5], a result of Uruguay Round negotiations which was aimed at reviewing Articles VI and XVI of the GATT, as well as the Subsidies Code signed by few parties to the GATT during the Tokyo Round[6]. Paragraph 1 of item (k) of Annex I of the SCM Agreement specifically includes export credits as a prohibited subsidy.[7] However, the Paris-based Organization for Economic Cooperation and Development (OCED) had started work on export credit even before the GATT/WTO developed disciplines on export credits---albeit in a limited way. In 1978, OECD Members signed the first version of the OECD Arrangement, a set of rules aiming to secure the level playing field among its signatories on export credits.[8]

The countries getting adversely affected by the widespread use of government supported export credits have two options in the current

[5] For a compilation of the documents and proposals during the Uruguay Round concerning the ASCM negotiation, *see generally*, URUGUAY ROUND SUBSIDIES AND COUNTERVAILING MEASURES (SCM) AGREEMENT NEGOTIATING HISTORY, http://www.worldtradelaw.net/history/urscm/urscm.htm.

[6] General Agreement on Tariffs and Trade, Punta Del Este Declaration- Ministerial Declaration of 20, September, 1986, BISD 33S/19- 28 ("Negotiations on subsidies and countervailing measures shall be based on a review of Articles VI and XVI and the MTN Agreement on subsidies and countervailing measures with the objective of improving GATT disciplines relating to all subsidies and countervailing measures that affect international trade. A negotiating group will be established to deal with these issues.").

[7] Agreement on Subsidies and Countervailing Measures, annex.I, item (k), 1, April 15, 1994, *available at* http://www.worldtradelaw.net/uragreements/scmagreement.pdf

[8] The history of international negotiations in the area of export credits date back to the 1950s. The forum in which it took place was the Organization for European Economic Co-operation – the OECD predecessor until 1961. At that point, the GATT and the OECD started to coordinate their regulation on export credits. For further details, *see* Michelle Ratton Sanchez Badin, *The WTO and the OECD rules on export credits: a virtuous circle? The example of the Embraer case and the 2007 civil aircraft understanding* (2008) (Direito GV (Working Paper)), *available at* http://www.direitogv.com.br.

circumstances. First, to challenge the export credit as a prohibited subsidy before the WTO dispute settlement body (DSB)[9] or to undo the 'unfair benefit' by imposing countervailing duties.[10] The first action is more direct, but it requires that the subsidies in question can be classified as an export subsidy which is prohibited by the SCM Agreement. The second option involves filing a countervailing duty (CVD)[11] investigation before the concerned domestic agencies, when it is determined that the subsidies have resulted in "material injury" to the domestic industry and that there is causal relationship between the subsidy and the material injury.

There is a certain amount of ambiguity as to whether CVD duty investigation can be used against subsidized export credits that have complied with the OECD Arrangement. The ambiguity revolves around the meaning of second paragraph of item (k) of Annex I of the SCM Agreement. It is clear that the first paragraph of item (k) prohibits subsidized export credits, and the second paragraph creates some sort of an exception for subsidized export credits that are granted in compliance with the OECD Arrangement. The second paragraph of item (k) states that "an export credit practice which is in conformity with [the Arrangement] shall not be considered an export subsidy prohibited by this Agreement".

The lack of clarity on the above debate has prompted different WTO members to argue apparently conflicting positions. The argument runs like

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[9] *See supra* note 4, art. 3.

[10] *See supra* note 5, Part V.

[11] General Agreement on Tariffs and Trade [hereinafter GATT], art. VI (3), 1994, *available at*http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_01_e.htm#general ("The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.").

this: if subsidized export credits are in conformity with the OECD Arrangement, they are not prohibited and consequently not export subsidies; if they are not export subsidies, they cannot be subsidies at all since it will be absurd to argue that subsidies which are consistent with the arrangement are some sort of domestic support. This view which is built on a slippery slope logical reasoning assumes that export credits are necessarily given in connection with or contingent upon on exports and if they are not considered as export subsidies, they need not treated as subsidies under other provision of the SCM Agreement.[12] There is also an appealing argument that export credits which are consistent with the OECD Arrangement should be treated as not conferring any "material advantage" and consequently not providing any "benefit" within the meaning of Article 1.1 of the SCM Agreement. On the other end of the spectrum, there is a view that even if the subsidized export credits are consistent with the OECD Arrangement, it might trigger a countervailing duty investigation. Under this approach, second paragraph of item (k) simply relegates subsidized export credits compliant with the OECD Arrangement from a prohibited export subsidy to any other subsidy which can still be actionable. It appears all the more clear that in order to resolve this issue, it is necessary to demarcate the boundary separating the term 'subsidy' from its exceptions. It is also necessary to understand the practice of domestic CVD agencies and their interpretation in illuminating this debate.

This paper seeks to examine the debate outlined above. Section A would like to provide a clear understanding of the term export credits and their use

[12] During the Uruguay Round, various countries expressed divergent views as to the obligations on notifications regarding export credits which were provided at a rate below the market rate, but were consistent with the Arrangement referred to in the proviso of item (k). See Note by the GATT Secretariat, Negotiating Group on Rules, MTN.GNG/NG 10/W/3 (Jan 6, 1987), VII (5).

in the international trading system. Section B deals with the efforts taken at various intergovernmental bodies in regulating export credits in the field of international trade. Sections C through F examine the jurisprudence of various WTO panels and the Appellate Body with reference to the characterization of exports credits which are in conformity with the OECD Arrangement. Section G examines the practice of domestic agencies in countervailing export credit schemes. Section H concludes.

A. Export Credits- Concept and History

Export credits are government financial support, direct financing, guarantees, insurance or interest rate support provided to domestic exporters or foreign buyers to assist in the financing of the purchase of goods from national exporters.[13]

Export finance has emerged as a critical tool for supporting international trade and for preserving competitiveness of various sectors in the global market place. A large number of countries have established export credit agencies (ECAs) that function as a public or semi-public bank borrowing from the public Treasury or capital markets and using the funds to finance exports. Finger and Shukrecht explain the importance of export credit agencies in trade financing, with special emphasis on developing economies:

> "…well-functioning ECAs are probably even more important for developing country exporters [than for industrial country exporters in developed countries]. The latter [developing country exporters]

[13]OECD, GLOSSARY OF STATISTICAL TERMS, http://stats.oecd.org/glossary/detail.asp?ID=909 (last visited Aug. 17, 2012).

> (and their banks) are often relatively small and, therefore, less able to generate their own information on commercial and political risk abroad. They are also likely to obtain less favourable financing terms because of mistrust by importers from other countries"[14].

Government supported export credits are generally offered at rates which are lower than the commercial market rates prevailing in the exporting country. In such cases the export credit agencies directly subsidize the interest rates. In other words, export credits which are offered at interest rates below the rates at which the agencies borrow funds from the Treasury are terms as "subsided" export credits.

Subsidized export credits have been in the domain of the OECD for at least the last four decades. Since 1975, subsidized export credits have been regulated by the OECD through the "Consensus" or "Gentleman's Agreement" or more formally known as the "Arrangement on Officially Supported Export Credits" (for short "Arrangement"). The countries that are part of the formal negotiating groups are known as "Participants". The current Participants include Australia, Canada, European Union, Japan, Korea, New Zealand, Norway, Switzerland and the United States. (*See Annex I*).Brazil is a Participant in the negotiating group on export credits for civil aircraft.

The main purpose of the Arrangement is basically threefold[15]: first, it places limitations on the conditions—the interest rate, term to maturity, down payments and the repayment schedule according to which the credit is

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[14] K. Michael Finger & Ludger Schulknecht, *Trade, finance and financial crises, in* WORLD TRADE ORGANIZATION SPECIAL STUDIES 3 10 (Geneva: WTO, 1999), http://www.wto.org/english/res_e/booksp_e/special_study_3_e.pdf.

[15] Andrew M. Moravcsik, *Disciplining Trade Finance: The OECD Export Credit Arrangement,* 43 INT'L ORG., 173, 178 (1989).

provided. Second, it adjusts these conditions automatically to changes in domestic capital market and international exchange rates. Third, it provides mandatory, albeit limited exchanges of information on credit practices. The 1978 Arrangement prescribed minimum interest rates 7 to 8 percent, a minimum down payment of 15 percent, standardized repayment schedules, common reporting procedures, maximum terms of payment of 8.5 years for OECD nations and ten years for Least-Developed Countries. The Arrangement has been revised periodically. On the whole, it could be opined that the Arrangement stabilized international export credit competition and committed some of the key developed countries not to derogate from minimum interest rates and maximum maturities to export finance arranged. The Arrangement went a long way in ensuring that exporters compete on the basis of the price and quality of their products rather than the financial terms provided.

B. Type of Export Credits

There are different types of export credits. Export credits extended by the supplier of goods, such as when the importer of goods and services is allowed to defer payment, can be classified under supplier's credits; export credits extended by a financial institution, or an export credit agency in the exporting country to buyers in an importing country are known as buyer's credits.[16]

In *Korea – Commercial Vessels,*[17] the question was raised whether a

[16] Int'l Monetary Fund [IMF], *External Debt Statistics: Guide for Compilers and Users*,Appendix III, Glossary, (2003), *available at* http://www.imf.org/external/pubs/ft/eds/Eng/Guide/file6.pdf.

[17] Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, (April 11, 2005), DSR 2005:VII, 2749.

loan will only constitute an "export credit" if it is conferred on the foreign buyer, or whether the term "export credit" also includes loans provided to exporters[18]. The European Communities (EC) relied on the definitions given by OECD[19] and contended that the PSLs[20] were not export credits as they were not extended to the foreign buyer but to the exporters.[21] Korea asserted that the EC's definition of "export credit" was narrow and relied on a broad interpretation of the concept of "export credit" provided by the OECD definition which runs as follows: "[B]roadly defined, an export credit arises whenever a foreign buyer of exported goods or services is allowed to defer payment. Export credits are generally classified as short-term (repayment terms of usually under two years), medium term (usually two to five years) and long-term (over five years). Export credits may take the form of "supplier credits" or "buyer credits". "Supplier credits" are extended by an exporter directly to an overseas buyer. "Buyer credits" are extended by an exporter's bank or other financial institution as loans to the buyer (or his bank). OECD Member countries may give official support to both types of transactions through their export credit agencies, provided that such support is in accordance with the Arrangement on Guidelines for Officially Supported Export Credits."[22] The WTO panel noted that both parties were relying on the OECD definition, but considered that the term "export credit" referred to paragraph 1 of item (k) need not necessarily be defined in the same way as the term "official export credits" as referred to in the second paragraph. The panel in *Korea – Commercial Vessels*,

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[18] *Id.* at 7.322.

[19] *See supra* note 10.

[20] PSLs were loans made to Korean companies in connection with export contracts for the purpose of assisting Korean exporters to finance production. *See* Panel Report, *Korea-Commercial Vessels*, *supra* note 13, at 7.122.

[21] Panel Report, *Korea- Commercial Vessels, supra* note 13, at 7.316.

[22] Panel Report, *Korea- Commercial Vessels, supra* note 13, at 7.319.

therefore, found that only the loans which are given to foreign buyers constitute 'export credits'. [23]

C. Are Export Credits Subsidies under the SCM Agreement?

All export credits need not be export subsidies. . The criteria for determining whether an export credit is a subsidy or not, is laid down by the SCM Agreement. According to Article 1.1[24] of the SCM Agreement, a 'subsidy' is a financial contribution made by a government or a public body which confers a 'benefit'. Three types of financial contribution are explicitly mentioned in Article 1, which appear to be straightforward.[25] They are:

i. a direct transfer of funds;
ii. a provision of goods or services or the purchase of goods or services by a government; and

a government payment to a funding mechanism or where government entrusts or directs a private body to carry out a particular policy.

The fourth type of financial contribution is slightly different from the three other categories outlined above, but could occur when government revenue that is "otherwise due" is foregone or not collected.

The term "benefit" in Article 1.1(b) means the financial contribution that places the recipient in a more advantageous position than would have

[23] Panel Report, *Korea- Commercial Vessels, supra* note 13, at 7.328.

[24] *Supra* note5, art. 1 ("For the purpose of this Agreement, a subsidy shall be deemed to exist if: (a)(1) there is a financial contribution by a government or any public body within the territory of a Member,and(b) a benefit is thereby conferred").

[25] Mel Annand, Donald F. Buckingham & William A. Kerr, *Export Subsidies and the World Trade Organization*, ESTEY CTR. L. & ECON. INT'L TRADE, http://www.esteycentre.ca/export_subsidies.htm (last visited Aug. 17, 2012).

been the case but for the financial contribution.[26] It means that a financial contribution will only confer a "benefit", i.e., an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market.[27] As the panel reiterated the existence of "benefit" (in the context of financing) is determined by reference to the terms at which similar financing is available to the customer in the market. In *EC-DRAMS*, the Panel noted that the existence of a benefit is a constitutive element of the definition of a subsidy: The panel noted, "only in cases where the financial contribution provides the recipient with an advantage over and above what it could have obtained on the market will the government's financial contribution be considered to have conferred a benefit and will a subsidy thus be deemed to exist."[28] The Panel also clarified, "if the public or publicly directed financial contribution is provided under the same conditions as a private market player would have provided, then there would be no reason to impose any discipline, simply because the financial contribution was provided by the government."[29]

In the case of export credit programmes, in most cases, there is a direct transfer of funds or a potential transfer of funds which confers a benefit on the recipient. For instance, in *Brazil- Aircraft (I),* the Brazilian National Treasury granted to the financing party an equalization payment to cover the difference between the interest charge contracted by the buyer and the cost to the financing party of raising the requisite funds. The interest

[26] Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, 9.112, WT/DS70/RW, WT/DS70/AB/RW (*adopted* Aug. 4, 2000), DSR 2000:IX, 4315.

[27] *Id.*

[28] Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, 7.175, WT/DS299/R (*adopted* Aug. 3, 2005), DSR 2005:XVIII, 8671.

[29] *Id.*

equalization payments were found to reduce the interest cost of the buyer by 3. 8 percentage points.

Under what circumstances can export credits become export subsidies? The meaning of term "export subsidy" is provided in Article 3 of the SCM Agreement which prohibits the subsidies which are 'contingent upon export performance' including those provided under Annex I of the SCM Agreement. As the term explicitly suggests, export credits are linked to exports. Item (k)[30] of Annex I identifies export credits as prohibited export subsidies if they are provided at rates below those which the governments granting them actually had to pay for the funds so employed or if the governments pay all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure material advantage in the field of export credit terms.

However, all export subsidies are not prohibited. The proviso to item (k) says that that if a member of the Agreement is a party to an international undertaking on official export credits to which at least twelve original

[30] *Supra* note 5. ("The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement").

Members to this Agreement are parties as of 1 January 1979 or applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited. The proviso points towards the OECD Arrangement, 1978 as it is the only international undertaking which befits the description. Though most of the WTO members are not party to the OECD arrangement, by the virtue of the proviso to item (k), these changes automatically become part of the SCM Agreement.[31]

Another key element that should be examined in this discussion is footnote 5 of the SCM Agreement. Footnote 5 categorically states, "[M]easures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement". In view of footnote 5 of the SCM Agreement, the proviso to item (k) is called a 'safe haven' clause.

D. Interpretation of Item (k): When Will Export Subsidies be No Longer Prohibited Subsidies?

The scope of item (k) of the Annex I was well discussed in *Canada – Aircraft* [32] in which Brazil contended that the measures taken by Canada, in respect of certain subsidies granted by the Government of Canada or its provinces with intention to support the export of civilian aircraft were inconsistent with Article 3 of the SCM Agreement. Canada during the panel

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[31] Panel Report, *Canada- Aircraft*, *supra* note 22, at 5.132. ("... [T]he second paragraph of item (k) is quite unique in the sense that it creates an exemption from a prohibition in a WTO Agreement, the scope of which exemption is left in the hands of a certain subgroup of WTO Members – the Participants, all of which as of today are OECD Members – to define, and to change as and when they see fit.").

[32] Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, WT/DS70/AB/R (*adopted* Aug. 20, 1999), DSR 1999:IV, 1443.

process argued that that the first paragraph of item (k) of the Illustrative List of Export Subsidies of Annex I of the SCM Agreement provides a specific contextual indication of what constitutes a subsidy. Canada noted that the first paragraph of item (k) identifies two elements in determining whether particular credit terms are subsidies: first, where governments provide credit at rates below those which they have to pay for the funds so employed, and second, where such credit secures a material advantage in the field of export credit terms.[33]

Canada noted its view that item (j) and the first paragraph of item (k) of Annex I to the SCM Agreement are not exceptions; they merely set out what type of practice would be an export subsidy. That is, an *export* credit provided by government that met the conditions of the first paragraph of item (k) would be an export subsidy; a complainant need only prove the elements of item (k) and does not need to further prove, for example, that the provision of the credit was "contingent on export performance". Canada submitted that the examples provided in the Illustrative List do not identify *a contrario* what would *not* constitute an export subsidy, and that such an interpretation would turn the Illustrative List into an exhaustive list.[34]

However Brazil argued that Annex I does not speak to whether every government activity constitutes a subsidy, but rather whether the government assistance constitutes a prohibited export subsidy. Brazil submitted that a measure may constitute a subsidy, but may not be on the Illustrative List of Export Subsidies included in Annex I.[35]

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[33] *Id.* at 5.38.

[34] *Id.* at 5.83.

[35] *Id.* at 6.91.

In this case, the European Communities, which was a third party, asserted that the first paragraph of item (k) is to be considered an *illustrative* prohibition (i.e., it does *not* exhaustively define the scope of Article 3.1(a) in this sector), and that the second paragraph by contrast contains an exception, not only from the first paragraph but from the whole of the SCM Agreement (the OECD "safe haven").[36]

The Panel provides a detailed analysis of the contentions of Brazil and EC. It stated, "[i]n our view, item (k) of the Illustrative List applies in determining whether or not a prohibited export subsidy exists. We do not consider that item (k) determines whether or not a 'subsidy' exists within the meaning of Article 1 of the SCM Agreement."[37]

The issue as to when will an export subsidy cease to be a prohibited export subsidy cannot be answered without examining the meaning and scope of the OECD Arrangement which finds an implicit mention in item (k), second paragraph.

E. 'Safe Haven' Provisions: Meaning of "Material Advantage" and the Scope of OECD Arrangement?

This section deals with the nature and scope of the 'safe haven' provisions in item (k). Paragraph 1 of item (k) clearly indicate that export credits at rates below those that governments actually have to pay for the funds so employed or the payment by governments of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far

[36] *Id*. at 7.16.

[37] *Id.* at 9.117.

as they are used to secure a material advantage in the field of export credit terms are prohibited export subsidies.[38] However, of export credits are provided at interest rates in conformity with the OECD Arrangement, there is no occurrence of any 'material advantage' and consequently any 'benefit'.

The interpretation to be given to the term "material advantage" has a special significance in the context of item (k). In *Brazil – Aircraft*, "material advantage" was interpreted to mean that the net interest rate (actual interest rate applicable minus government payment) must be compared to the Commercial Interest Reference Rates (CIRRs)[39] or alternatively, an alternative benchmark, the appropriateness of which must be demonstrated by the Party seeking to make use of it.[40] As mentioned earlier, in *Canada – Aircraft*, Canada argued that the first paragraph of item (k) identifies two elements in determining whether particular credit terms are subsidies: first, credit at rates below those which they have to pay for the funds so employed, and second, where such credit secures a material advantage in the field of export credit terms. Canada said that the test in determining whether government credit is a subsidy is therefore whether there is a net

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[38] *Supra* note 5.

[39] CIRRs are official lending rates of export credit agencies. Under Articles 19-22 of the OECD Arrangement, each Participant is allowed to establish a CIRR for its national currency, which is set at 100 basis points above the applicable government bond yields depending on the maturity and other Participants have to use this CIRR in case those countries decide to finance in that currency,

[40] Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, 181, WT/DS46/AB/R (Aug. 20, 1999), DSR 1999:III, 1161; Panel Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, 6.83, WT/DS46/RW, WT/DS46/AB/RW (Aug. 4, 2000), DSR 2000:IX, 4093; Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, 61-77 WT/DS46/AB/RW (Aug. 4, 2000), DSR 2000:VIII, 4067Panel Report, *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, 5.236, WT/DS46/RW/2 (Aug. 23, 2001), DSR 2001:X, 5481.

cost to the government, and whether as a result an advantage is granted above and beyond what the market would provide.[41] Canada argued that as the Export Development Corporation (Canada's credit programme) always lent above its cost of funds, and did not incur a net cost on its financing activities, and that as it operated on the basis of commercial principles, it did not provide an advantage above and beyond the market. For Canada, EDC financing did not therefore constitute a subsidy.[42]

To what extent are the disciples of Article 1.1 of the SCM Agreement relevant in identifying a an export subsidy within the meaning of paragraph 1 of item (k) of Annex I. For Brazil, Article 1.1(a) indicates that to have a subsidy, the government must be the source of the financial contribution. Brazil asserted that the verb "confer" means to "grant," "bestow," "give" or "endow" and the noun "benefit" means "advantage" or "something that guards, aids, or promotes well-being". Thus, Brazil submitted that read in its entirety, Article 1.1 therefore states that a subsidy exists where a government contributes something, and in so doing gives an advantage.[43]

Brazil contended that no part of Article 1.1 imposes the requirement that a complainant demonstrate a "net cost" to the government by virtue of a financial contribution.[44] Thus, lending above cost does not demonstrate that no advantage is given; governments may lend above their cost and give an advantage to a recipient relative to the terms a borrower could receive elsewhere.

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[41] Panel Report, *Canada- Aircrafts*, *supra* note 28, at 5.38.
[42] Panel Report, *Canada- Aircrafts*, *supra* note 28, at 6.77.
[43] Panel Report, *Canada- Aircrafts*, *supra* note 28, at 6.92.
[44] Panel Report, *Canada- Aircrafts*, *supra* note 28, at 6.77.

The Panel was not persuaded by the interpretation of the term 'benefit' as advocated by Canada.[45] It held, "[t]he dictionary definition of "benefit" refers to "advantage", and not to net cost. In order to determine whether a financial contribution (in the sense of Article 1.1(a)(i)) confers a "benefit", *i.e.*, an advantage, it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution. In our view, the only logical basis for determining the position the recipient would have been in absent the financial contribution is the market. Accordingly, a financial contribution will only confer a "benefit", *i.e.*, an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market".[46] The Appellate Body upheld the reasoning of the panel.[47]

The ordinary meaning of the term "benefit" indicates an "advantage". Since the interpretations given by the WTO panels of the term "benefit", also include a reference to an "advantage", it is important to dwell on the significance and distinctive role of "material advantage" appearing in paragraph 1 of item (k). The *Brazil- Aircraft (Article 21.5)* illustrated the utility of the "material advantage" clause. Drawing from the facts of *Brazil-Aircraft* dispute, the panel introduced a hypothetical which is broadly as follows: the cost of funds for the Brazilian government for providing export credits to aircrafts is in excess of 13 percent. By contrast many purchasers of the Brazilian aircrafts were offered private export credit financing at an interest rate significantly lower than 13 percent. In such a situation direct

[45] Panel Report, *Canada- Aircrafts*, *supra* note 28, at 9.111.

[46] Panel Report, *Canada- Aircrafts*, *supra* note 29, at 9.112.

[47] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, 220, WT/DS70/AB/R, (Aug. 20, 1999), DSR 1999:III, 1377.

financing by the Brazilian government would entail a cost to the government, but no advantage, material or otherwise to the foreign buyer. Admittedly, the cost of funds is higher than the rate at which export credits are provided. In other words, a payment by Brazil that allowed one if its financial institutions to provide export credits to a foreign customer on the same terms as other international financial institution could provide, would result in a prohibited subsidy absent the "material advantage" clause. It bears repetition that in the absence of a "material advantage" clause, a complainant could demonstrate the existence of a prohibited subsidy merely by pointing out the higher of cost of funds for Brazil as compared to the interest rate terms of the export credits made available. Considering that such an interpretation is unfavourable to the developing countries that may face a higher cost of funds, WTO panels have been careful in following an evolutionary interpretation in interpreting the clause "material advantage".

The important point to note is that for determination of "material advantage", a WTO panel should use the net interest rate (i.e. the actual interest rate after the deduction of the government support) and compare with an appropriate benchmark. In the *Brazil- Aircraft* (*I)* dispute, the Appellate Body referred to the Commercial Interest Reference Rate ("CIRR") prepared by the OECD as a appropriate benchmark by which to assess whether payments are used to secure a material advantage in the field of export credit terms. The jurisprudence eviscerated by the Appellate Body clearly focuses on using the CIRR as a benchmark although other standards of comparison are theoretically permissible. The fact that the net interest rate is less than the relevant CIRR is a positive indication that the government payment has been used "secure a material advantage".[48] However, determination of benefit need not be based on a single commercial rate such as the CIRR; furthermore, the rates may depend upon the length of maturity as well as the credit worthiness of the borrower.

As argued in the previous paragraphs, there is a propensity to conflate the meaning of "benefit" in Article 1.1 with the concept of "material advantage" in paragraph 1 of item (k) and compliance with the OECD Arrangement in paragraph 2 of item (k). Even the Appellate Body in *Brazil- Aircraft* recognized that the meaning of "material advantage" in item (k) is legally distinct from the existence of a "benefit" under Article 1.[49] In terms of the test identified by the Appellate Body, for determining the "material advantage" the focus is on finding out whether the net interest rate is below the CIRR whereas determination of subsidy under the Article 1.1 of the SCM Agreement merely enquires whether the financial contribution makes the recipient better off than it would otherwise have been absent that contribution.[50] It may be appropriate to recall that the determination of subsidy in the case of an officially supported export credit programme would be more accurately determined by the principles enshrined in Articles 14 (b) and (c) of the SCM Agreement. Another key issue is whether the determination of "material advantage" *ipso facto* results in a finding of "benefit" under Article 1.1 of the SCM Agreement? A short answer is that the concept of "material advantage in the field of export credit" is broader and assessed through a different benchmark as opposed to determination of "benefit". A WTO

[48] *Brazil – Export Financing Programme for Aircraft*, Report of the Appellate Body, 182, WT/DS46/AB/R, (Aug. 20, 1999).
[49] Appellate Body Report, *Brazil –Aircraft*, supra note 45, 179.
[50] *Id.*, 157.

panel in *Canada- Aircraft Credits and Guarantee*, held that the fact that the repayment terms exceed the maximum term authorized under the OECD Arrangement does not constitute positive evidence that a benefit is conferred.[51]

The foregoing discussion would indicate that the "material advantage" clause can be considered as a limited and an exceptionally narrow "safe haven" provision for certain categories of export credits. The Appellate Body's reference to the CIRR prepared by the OECD would imply that the OECD Arrangement would have an indirect application in determining the availability of the "safe haven" under the first paragraph of item (k). Although the reference to the OECD Arrangement is only mentioned in the second paragraph of item (k), the Appellate Body clarified that it can be considered as a useful context within the meaning paragraph 1 as well.

However, the most relevant and the direct 'safe haven' provision under item (k) is indeed paragraph 2. This safe haven provision is available not only to the current nine Participants (counting 27 countries in the EU as one), but also to other Members of the WTO applying the interest provisions of the Arrangement in practice.

The safe haven under paragraph 2 does not have any *a priori* exclusions, but applies to an "export credit practice". It includes direct credits which are covered by the first part of item (k), paragraph 1 as well as other types of official financing support, such as interest rate support.[52]

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[51] Panel Report, *Canada- Export Credits and Loan Guarantee for Regional Aircraft*, WT/DS 222/R and Corr.1 (Feb. 19, 2002).

[52] Proviso, item (k), annex I of SCM Agreement.

It may also include pure cover under export credit guarantees under item (j) of Annex I. However, paragraph 2 delimits the scope of export credit practice as it expressly stipulates that only practices which are in conformity with the 'interest rate provisions' of the OECD Arrangement are not prohibited. Therefore in reality only those export credit practices which are: (i) in the form of official finance support; (ii) have repayment terms of at least 2 years; and (iii) have fixed interest rates are eligible to receive the protection of the safe haven.[53] As a matter of fact, official financing support is justified under the safe haven if it aligns with the CIRR as well as with other repayment requirements.

There is further evidence that conformity with the OECD Arrangement will not be relevant for determination of benefit under Article 1.1. A recent IMF study[54] noted that the premium rates charged by the ECAs are not directly comparable to private premium rates as the private sector does not generally offer the cover available through ECAs. However, under the private investor test, such official support could still constitute specific subsidies actionable under the SCM Agreement.

At this juncture, it is perfectly reasonable to ask whether the absence of "material advantage" under paragraph 1 of item (k) is likely to negate the existence of a subsidy even under Article 1.1 of the SCM Agreement. Furthermore, the Arbitrators in the proceeding in *Brazil- Aircraft* (Article 22.6) clarified that the fact that an export subsidy is justified under item (k) "does not mean that it is no longer a subsidy. It simply means

[53] Panel Report, *Canada- Aircraft (21.5)* , *supra* note 23 at fn. 50
[54] INTERNATIONAL MONETARY FUND, Officially Supported Export Credits in a Changing World(2005), at 44.

that it is not a *prohibited* subsidy".[55] Accordingly, it can be concluded that the concepts of "material advantage" and "benefit" are separate concepts and that even if an export credit programme is in conformity with Paragraph 1 and 2 of item (k) of Annex I of the SCM Agreement, such programmes can still constitute subsidies under Article 1.1 of the SCM Agreement.

F. Does the WTO jurisprudence permit an "a contrario" interpretation?

It has been an interesting debate for a while whether subsidies that qualify the limited safe haven provisions under paragraph 1 of item (k) and (j) can be justified based on an a *contrario* interpretation? The *a contrario* interpretation in terms of item (k) means that the first paragraph of item (k) of the Illustrative List under Annex I can be interpreted *a contrario sensu*[56] to create an exception to the prohibition in Article 3.1 of the SCM Agreement for measures that in some respects fall outside of the description of the export subsidy illustrated in the first paragraph of item (k).[57] In other words, if a subsidy programme does not meet every requirement provided in Annex I, *a contrario* interpretation requires that the respondent may be permitted to use this fact an affirmative defence that the alleged subsidy programme is not an export subsidy

The Appellate Body so far has not explicitly ruled whether an *a*

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[55] *Brazil – Export Financing Programme for Aircraft: Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, 3.39, WT/DS46/ARB, (Dec. 12, 2000),

[56] *A contrario* sensu" means "on the other hand; in the opposite sense". *See Black's Law Dictionary* 23 (7th ed., 1999).

[57] Panel Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, annex. A, 29, WT/DS46/RW, WT/DS46/AB/RW (Aug. 4, 2000), DSR 2000:IX, 4093.

contrario interpretation of the items of the Illustrative List in Annex I is permissible or not. As in *Brazil-Aircraft-Article 21.5,* the Appellate Body said, "[I]f Brazil had demonstrated that the payments made under the revised PROEX[58] were not 'used to secure a material advantage in the field of export credit terms', and that such payments were 'payments' by Brazil of 'all or part of the costs incurred by exporters or financial institutions in obtaining credits', then we would have been prepared to find that the payments made under the revised PROEX are justified under item (k) of the Illustrative List."

However, the Panels in *Brazil-Aircraft (I)*[59] and *Korea-Commercial Vessels*[60] have categorically rejected the defense taken by the parties based on *a contrario* interpretation'. The panel in *Brazil – Aircraft (Article 21.5)* observed that footnote 5 to the SCM Agreement provides an explicit textual basis for determining whether and under what conditions the Illustrative List may be used to demonstrate that a measure is not a prohibited export subsidy.[61] The panel therefore considered whether or not the Illustrative List provision at issue contained any affirmative statement that a measure is not an export subsidy, or that a measure not satisfying the conditions of that provision is not prohibited, and thus falls within the scope of footnote 5.[62] Finally, the panel noted that a broad reading of footnote 5 could place developing country Members at a permanent, structural disadvantage in the field of export credit terms, a result that it considered to be inconsistent with

[58] PROEX was created by the Government of Brazil to provide export credits to Brazilian exporters either through direct financing or interest rate equalisation payments. *See Id.* at 2.1.

[59] *Id.* at 635-641.

[60] *Id.* at 7.195- 7.207.

[61] *Id.* at 6.33, 6.34.

[62] *Id.* at 6.36, 6.37.

one of the objects and purposes of the WTO Agreement.[63]

In *Korea-Commercial Vessels,* the panel followed the reasoning in *Brazil – Aircraft (Article 21.5)* and gave same reasons for rejecting the *a contrario* interpretation of item (j) and item (k). It asserted that as item (j)[64] contains no affirmative statement and merely describes certain circumstances in which particular programmes shall constitute export subsidies, it therefore falls outside the scope of footnote 5 and does not provide a basis on which to find that measures do not constitute prohibited export subsidies.[65]

In *Korea-Commercial Vessels*, Korea argued that the reasoning of the *Brazil – Aircraft (Article 21*.5) panel should not be followed because it was invalidated by the Appellate Body. However, the panel said, "we do not accept that this amounts to a reversal of the panel's findings, nor a legal finding by the Appellate Body that an *a contrario* interpretation of the first paragraph of item (k) is permissible. This is because the Appellate Body explicitly stated that "[i]n making this observation, we wish to emphasize that we are not interpreting footnote 5 of the SCM Agreement, and we do not opine on the scope of footnote 5, or on the meaning of any other items

[63] *Id.* at 6.46- 6.66.

[64] Same reasoning for first paragraph of item (k) as the Panel mentioned "We have already determined that an *a contrario* interpretation of item (j) is not permissible. We see no reason why we should not reach the same conclusion in respect of the first paragraph of item (k). Since the first paragraph of item (k) does not contain any affirmative statement that a measure is not an export subsidy, nor that a measure not satisfying the conditions of that paragraph is not prohibited, we consider that it does not fall within the scope of footnote 5 of the SCM Agreement. We note that this finding is consistent with the report of the Brazil – Aircraft – Article 21.5 panel, with which we agree. In light of the above, we find that the first paragraph of item (k) may not be interpreted *a contrario*". *See* Panel Report, *Korea-Commercial Vessels*, *supra* note 13, at 7.310.

[65] Panel Report, *Korea-Commercial Vessels* , *supra* note 13, at 7.198.

in the Illustrative List."[66]

Korea also argued that the negotiating history of footnote 5 shows that the drafters intended to expand, rather than restrict, the scope of footnote 5.[67] However, the panel followed the reasoning of another panel in *Brazil – Aircraft (Article 21.5)*, "[t]he drafters have provided us with a specific textual provision that addresses the issue when the Illustrative List can be used to demonstrate that a measure is not a prohibited export subsidy. The fact that this footnote was adjusted on at least one occasion suggests that the drafters gave this issue consideration and provided the answer to this question. If we were to conclude that the Illustrative List by implication gave rise to "permitted" measures beyond those allowed by footnote, we would be calling into serious question the raison d'être of footnote 5."[68]

Also the panel in *Korea-Commercial Vessels*, reiterated the reasoning in *Brazil (Aircraft – Article 215)*, regarding the structural disadvantages for developing country members that would result from *a contrario* interpretation of item (j).[69] In *Brazil – Aircraft(Article 21.5)*, the panel stated, "in the case of a government guarantee, a lending bank establishes financing terms in light of the risk of the guarantor government, not the borrower. Developed countries generally present a lower risk of default than developing countries, and a developing country may often be perceived as posing a higher risk than even the borrower to whom a guarantee might be extended. As a result, while developing countries in theory could utilise any

[66] Panel Report, *Korea-Commercial Vessels* , *supra* note 13, at 7.197.
[67] Panel Report, *Korea-Commercial Vessels* , *supra* note 13, at 7.200.
[68] Panel Report, *Korea-Commercial Vessels* , *supra* note 13, at 7.200; Panel Report, *Brazil –Aircraft*, *supra* note 44, at 6.39- 6.41.
[69] Panel Report, *Korea-Commercial Vessels*, *supra* note 13, at 7.205.

"safe harbour" under item (j) to provide loan guarantees at the same premium rates as developed countries, the effect of guarantees by developing country members on the interest rate of the guaranteed export credits would be minimal or non-existent in most cases. In other words, a broad reading of footnote 5 would, in respect of item (j), allow developed countries to support export credits at interest rates that would be consistently lower than those of export credits supported by developing countries."[70]

Korea also argued that a failure to permit an *a contrario* reading of the first paragraph of item (k) would render the "material advantage" clause ineffective. The panel did not agree with Korea and held, "[I]n our view, the primary role of the Illustrative List is not to provide guidance as to when measures are *not* prohibited export subsidies – although footnote 5 allows it to be used for this purpose in certain cases – but rather to provide clarity that certain measures *are* prohibited export subsidies. Thus, it would be possible to demonstrate that a measure falls within the scope of an item of the Illustrative List and was thus prohibited without being required to demonstrate that Article 3, and thus Article 1, was satisfied." [71]

The jurisprudence available on this topic conclusively demonstrate that , in the absence of an affirmative statement such as paragraph 2 of Item (k), the WTO panels are not prepared for an expansive interpretation of paragraphs 1 of (j) and (k) of Annex I of the SCM Agreement.

G. Domestic CVD investigations

[70] Panel Report, *Canada –Aircraft*, *supra* note 29, at 6.59.
[71] Panel Report, *Korea-Commercial Vessels* , *supra* note 14, at 7.311.

No dispute concerning the countervailability of export credits programmes consistent with the OECD Arrangment has been adjudicated at the WTO dispute settlement body. However, for the purposes of this study, the limited focus was whether any major jurisdiction has countervailed an export credit programme which was in conformity with the OECD Arrangement. An indicative list cases examined during this research is annexed as Annex II.

Most of the domestic CVD actions discussed below were investigated during the pre-WTO period. However, considering that the text of item (k) has remained almost unchanged, it will be pertinent to examine the jurisprudence and practice, however undeveloped they are, for appreciating the past practice in this field.

(a). Rail Cars Case[72]

This is a CVD action taken by the U.S. Department of Commerce (USDOC) in 1983. In this case, Metropolitan Transportation Authority, New York (MTA) issued two invitations for bids for a total of 1150 railcars and 226 cars. MTA specifically requested bids to be supported by financing. Four parties responded: Budd (a U.S. producer of railcars), Bombardier (a Canadian manufacturer), Kawasaki (a Japanese railcar manufacturer), and Francorail (a consortium of French manufacturers). Bombardier's efforts to secure financing for its bid began soon after MTA's invitation was made, when it approached the Export Development Corporation (EDC), a Canadian Crown Corporation wholly owned by the Canadian Government. EDC was created to help, develop and facilitate Canada's export trade within the framework of the Canadian Export Development Act by

[72] Rail Passenger Cars from Canada, 47 Fed. Reg. (U.S. Int'l Trade Comm'n 1982).

providing insurance, guarantees, and direct export credits to buyers and sellers of Canadian manufacturers and services.[73]

The Export Development Corporation, Canada (EDC) agreed to finance 85% of the deals between Bombardier, Canada and MTA. Bombardier contracted price up to U.S. $750 million at an interest rate of 9.7% per annum. In exchange, the MTA agreed to provide the EDC with MTA bonds. The MTA also agreed to pay the EDC a loan commitment fee and other administrative costs.

In 1982, Budd Company (Budd), filed a petition on behalf of the U.S. industry producing railcars alleging that certain benefits which constitute export subsidies are being provided, directly or indirectly, to the manufacturers, producers, or exporters in Canada of railcars.

MTA contended that the EDC financing was not countervailable at all because it was simply an attempt under Article 6 of the OECD Arrangement to match a "prior commitment" of 9.7 percent financing offered by France in support of bid made to MTA by Francorail.[74] Also, by using the matching rate of 9.7 percent as benchmark, no countervailable benefit was conveyed.

However, the Department of Commerce held that item (k) was not intended to condone export credits offered to match other credits which were in derogation from the minimum interest rate provisions of the OECD Arrangement. Item (k) exempts only "an export credit practice which is in conformity with ‘the minimum interest rate provisions’ of the OECD

[73] 48 Fed. Reg. 6569, *6571
[74] *Id.* at *6579

Arrangement from the prohibitions of the Subsidies Code. By contrast, the matching provisions of the OECD Arrangement deal exclusively with offers which are not in conformity with the Arrangement. A provision which allows one party to follow the derogation of another cannot somehow make the second derogation into 'an export credit practice which is in conformity with' the Arrangement when both offers are identical derogations."[75]

Commerce determined that the EDC export credit financing constituted a subsidy within the meaning of the countervailing duty law because the EDC rate was below the commercial benchmark for a comparable financing arrangement. The interest rates and repayment terms offered by the EDC were also below the minimum interest rate provisions permitted by the OECD Arrangement.

(b). Stainless Steel Wire having a diameter of 1 mm or more originating in India and the Republic of Korea[76]

This is an action taken by the DG Trade, European Commission in 1998. In June 1998, the Commission announced by a notice the initiation of an anti-subsidy proceeding with regard to imports into the Community of stainless steel fine wire having a diameter of 1 mm or more originating in India and the Republic of Korea (hereinafter 'Korea`) and commenced an investigation. EXIM, a state owned bank, established under the Export-Import Bank of Korea Act provided medium and long-term loans for export and import transactions by using the following schemes: Export Credit (EXIM-EC), Foreign Investment Credit (EXIM-FIC) and Export loans for SME's that export capital goods (EXIM-SM). EXIM-EC was available to all

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[75] *Id.*

[76] Official Journal L 079 , 24/03/1999 P. 0025 - 0059

companies that exported capital goods. Export credits were either pre-shipment based or post-shipment based. Pre-shipment based export credits were given in the form of a loan to finance the production of 'manufactured products` destined for export.

EXIM-FIC was available to all companies that made foreign investments. For EXIM-SM, EXIM judged applicants not on their present export performance (as for EXIM-EC) but on their export performance over the past 2 years. When an application was approved by EXIM, the Small and Medium Enterprises could get a credit up to 90 percent of the total investment needed to produce and export the expected exports during the lending period. The maximum credit amount an SME could get from EXIM would be 1/3rd of total export sales of the previous year.

In order to review whether there was a benefit conferred under the other programmes, a comparison was made with comparable commercial loans obtained by the respective cooperating exporter, or, if no such information was available, with comparable commercial loans obtained by other cooperating exporters which are considered to be in the same financial situation and the same sector. This analysis showed that EXIM-EC loans on pre-shipment basis, EXIM-FIC and EXIM-SM loans were granted at interest rates which were generally lower than comparable commercial loans, thereby conferring a benefit on the recipient of the loans.

The commission concluded that EXIM-EC on pre-shipment basis and EXIM-SM were contingent upon export performance. Also, EXIM-FIC was available only to companies which invested abroad. This criterion was not considered to be neutral since it favored companies which invested abroad over companies which did not. Hence, EXIM-EC on pre-shipment basis, EXIM-SM and EXIM-FIC were considered specific and countervailable.

Korea has apparently raised a ‘safe haven’ defense arguing that the export credit in question was consistent with the OECD Arrangement. Commission also determined that EXIM-EC on pre-shipment basis did not fall under item (k) of Annex I of the Basic Regulation since only export financing with a duration of two years or more can normally be regarded as 'export credits` within the meaning of the OECD Arrangement. It further upheld that this provision was also not applicable to EXIM-SM or EXIM-FIC since these loans were not used for export transactions but for the investment in facilities for export production or foreign investment, respectively.

(c). Certain Steel Products from Spain[77]

This CVD action was initiated by the USDOC. The investigations focused on certain benefits which constituted subsidies within the meaning of the countervailing duty law of United States. One of the programs determined to bestow countervailable benefits was short-term preferential loan program. In Spain, short-term borrowing was for any period up to 18 months. The only short-term borrowing reported by the companies under investigation was that obtained under the Privileged Circuit Exporter Credits, under which firms might obtain working-capital loans for less than one year, the total of which was not to exceed a specified percentage of their previous year's exports.

[77] 47 Fed. Reg. 51438

Spain took the plea that such financing was in accord with the OECD Arrangement on export credits and was, therefore, consistent with item (k) of the Illustrative List of Export Subsidies. However, USDOC concluded that short-term credits were not covered by the OECD Arrangement, which applies to loans of not less than two years duration. Therefore, the provisions of paragraph 2 of item (k) of the Illustrative List were not relevant. Since the loans were made available at less than the cost of money to the Spanish Government, the Department concluded that the program is inconsistent with the terms of paragraph 1 of item (k).

(d). Certain Textile Mill Products from Mexico78

In this case, the imports of certain textile mill products from Mexico were countervailed by U.S. Department of Commerce. The Mexican Textile Industry Chamber argued, "[t]he appropriate benchmark for both determining whether FOMEX financing[79] is a countervailable subsidy or not and measuring the benefit from such financing is the cost to the Government of Mexico of obtaining similar funds. Item (k) of the Illustrative List of Export Subsidies appended to the Tokyo Round Subsidies Code, and incorporated by reference in section 771(5)(i) of the Tariff Act as part of the statutory definition of an export subsidy, provides that the benchmark for considering export credits as subsidies is whether

[78] *Certain Textile Mill Products From Mexico; Final Results of Countervailing Duty Administrative Review*, C-201-405 (1991).

[79] Effective January 1, 1992, the Mexican Treasury Department eliminated the FOMEX loan program and transferred the FOMEX trust to the Banco Nacional de Comercio Exterior, S.N.C. (BANCOMEXT). The BANCOMEXT program operates much like its predecessor, FOMEX. BANCOMEXT offers short-term financing to producers or trading companies engaged in export activities; any company generating foreign currency through exports is eligible for financing under this program. See *preliminary results of its administrative review of the countervailing duty order on certain textile mill products from Mexico* (50 FR 10824; March 18, 1985).

funds have been provided to the borrower at less than the cost of funds to the government. The Department has recognized the Illustrative List as a source of applicable benchmarks for export-related government programs. The Understanding[80] also uses this cost-to- government standard. The Department has erroneously and illegally used a commercial benchmark to measure the benefit from FOMEX loans."

However the Department held, "[T]he cost-to-government standard in the Understanding applies only to whether Mexico is in compliance with the Understanding and does not limit the United States in applying its own national countervailing duty law with regard to subsidized imports from Mexico. We addressed this issue and our use of a commercial benchmark for short-term financing at length in the last review of this order.[81] The use of a commercial benchmark is consistent with standard of measuring subsidies from countervailing financing in terms of the benefit to the recipient rather than the cost to the government."

(e). Porcelain-on-Steel Cooking ware from Mexico[82]

In this case, respondents[83] contented, "[D]uring the 1993 Bancomext

[80] Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties, signed on April 23, 1985.

[81] See *Certain Textile Mill Products from Mexico; Final Results of Countervailing Duty Order Administrative Review* (54 FR 36841; September 5, 1989).

[82] Porcelain-on-Steel Cookingware From Mexico; Final Results of Countervailing Duty Administrative Review, C-201-505 (1995)

[83] Acero Porcelanizado, S.A. de C.V. (APSA) and Cinsa, S. A. De C.V. (Cinsa), producers of the subject merchandise which exported porcelain-on-steel cookingware to the United States during the review period.

financing[84] was provided at interest rates higher than the cost of funds to Bancomext or the Government of Mexico. Under item (k) of the Illustrative List of export subsidies, only the provision of financing at interest rates below the government's cost of borrowing is countervailable. Since the GATT Subsidies Code's Illustrative List of export subsidies does not include government financing at rates above the government's cost of funds, the Department should determine that Bancomext was not a countervailable program, and that the loans obtained through the Bancomext facilities were not countervailable during the POR". Respondents contend that the Department confirmed at verification that the audited financial statements showed no funding from government sources, and that Bancomext was a profit making operation throughout the POR."

However, Department refused to accept the contention. It held, "[W]ith the broad definition of a subsidy contained in 19 U.S.C. section 1677(5), Congress specifically included government action which results in the provision of capital and loans on ``terms inconsistent with commercial considerations," the provision of goods or services at ``preferential rates," and the like, to a specific group of beneficiaries.[85] The cost to government standard which defines an export subsidy in Item (k) of the Illustrative List does not limit the United States in applying its own national countervailing duty law to determine the countervailability of subsidy benefits. The Department determines the countervailability of subsidies by measuring the

[84] Banco Nacional de Comercio Exterior, S.N.C. (Bancomext) was a government program through which short-term financing is provided to producers or trading companies engaged in export activities. In order to be eligible for Bancomext financing a company must be established according to Mexican law, 30 percent Mexican national owned, and be an exporter. See *Porcelain-on-Steel Cookingware From Mexico; Preliminary Results of Countervailing Duty Administrative Review* (56 FR 48163; September 24,1991)

[85] See 19 U.S.C. section 1677(5)(A)(ii)

benefit to the recipient rather that the cost to the government. Where, as here, loans are given below commercial market rates, a benefit is conferred. Because these benefits were limited to exporters, we determine that this program is countervailable".[86]

(f). CVD Action on Forged Undercarriage Components from Italy[87]

On August 24, 1983, the Import Administration of USDOC determined that the Government of Italy was providing manufacturers, producers or exporters of semi-finished forged undercarriage components with certain benefits which constitute subsidies within the meaning of the U.S. CVD law.

Part IV of Italian Law 227 established a medium term credit financing to promote the exportation of goods and services. *Mediocredo Centrale* administered the export credit finance through "Special Medium and Long-term Credit Institutions".

It was alleged that during the Period of Investigation (POI), certain shipments of forged undercarriage components were financed through a program of export credits administered by the Italian Government. Under

[86] See e.g., *Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria* (58 FR 37217, 37260; July 9, 1993), *Certain Textile Mill Products From Mexico; Final Results of Countervailing Duty Order Administrative Review* (54 FR 36841, 36843-36844; September 5, 1989), *Certain Textile Mill Products From Mexico; Final Results of Countervailing Duty Administrative Review* (56 FR 12175, 12177; March 22, 1991.

[87] *Final Affirmative Countervailing Duty Determination: Forged Undercarriage Components from Italy*, C-475-008, (1983)

this programe, an export credit facility was made available in 1981 between one of the "Special Medium and Long-term Credit Institutions" and a French commercial bank. This facility provided an "umbrella" line of credit to the French bank at a rate consistent with the OECD Arrangement. The French bank could thus be relend the funds provided under the umbrella at any rate above the OECD rate. These loans provided by the French bank were buyer's credit tied to exports from Italy and were subject to approval by Italian authorities. However, the umbrella facility expired in 1983.

The USDOC apparently did not reach a finding that the export credit facility was a countervailable subsidy, since it was not established that the export credit facility were availed by the exporters in question. However, the USDOC made the following observation:

> The countervailing duty law does not exempt from its provisions preferential export credit financing that complies with the requirement of the OECD Arrangement. (Para. 8)

This observation by USDOC amply summarizes the position of the United States in initiating CVD actions against export credit schemes which are otherwise consistent with the OECD Arrangement.

H. Conclusion

Export credits have a key role in international trade. This paper sought to examine the efforts at the WTO and in various domestic jurisdictions in disciplining the use of use of export credit that may have a trade distorting impact.

One of the limited objectives of this paper has been to explain the interpretation of 'safe haven' provisions of paragraph 1 and 2 of item (k) of

Annex I of the SCM Agreement. How safe are the ‘safe haven’ provisions? The safe haven defenses have been used in several WTO disputes and domestic disputes, but a required level of clarity in the application of the safe haven provisions is still missing. For instance, interpretation of the clause “material advantage” under item (k) of Annex I, existence of “benefit” under Article 1.1 of the SCM Agreement in the absence of “material advantage”, meaning and legitimacy of “a contrario” interpretation with respect to paragraph 1 of item (j) and (k) of Annex I, etc have been examined at length. The findings of various panels and the Appellate body on the interpretation of item (k) are used to illuminate this debate. The conclusion of this paper is that export credit support in accordance with safe haven might still be countervailable and has indeed be countervailed as discussed under Annex II. This paper has also examined the meaning of the term ‘material advantage’ in item (k) of Annex I and how this term is different from the meaning of ‘subsidy’ under Article 1.1 of the SCM Agreement. The term ‘material advantage’ is limited to financing terms in the field of export credit, whereas the concept of benefit is examined from the perspective of the beneficiary. The comparators are different. This finding is arrived at based on the explicit statements of the WTO panels and the Appellate Body in various cases. This conclusion is also fortified by the findings and observations of various domestic CVD investigating agencies as provided under Annex II.

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ANNEX I		
YEAR	**AMENDMENT**	**MEMBERS**
1978		Australia, Canada, European Economic Community[88] ,Finland, Greece, Japan, Norway, Portugal, Spain, Sweden, Switzerland and the United States
1981	The minimum interest rates for providing official financing support were increased sharply.	
1983	The minimum matrix interest rates were raised and CIRRs for low interest rate currencies were introduced.	
1984	This Understanding was introduced to reflect the development of the nuclear power industry and the export, with official support, of nuclear power plants.	
1985	The minimum grant element for tied aid was raised from 20% to 25% and the notification procedures for such aid were strengthened.	
1986	A standard formula for setting CIRRs was agreed and a Sector Understanding on Export Credits for Civil Aircraft was incorporated in the Arrangement.	
1987	A Package of reforms on tied aid was agreed, including the increase of the minimum concession level to 35%	
1991	This Package of measures, agreed in December 1991 and which came into effect in February 1992, prohibited tied and partially untied aid for richer developing countries as well as for projects which should be financed commercially and	

[88] Belgium, Denmark, France, Germany, Italy, Ireland, Luxembourg, the Netherlands and the United Kingdom

	notification procedures strengthened. The Differentiated Discount Rate was refined and the Participants' Consultations Group on Tied Aid was formed to determine the commercial viability of projects. The intention of the tied aid disciplines was to redirect such aid away from richer developing countries (those whose per capita GNP makes them ineligible for 17-year loans from the World Bank), which are generally creditworthy and thus able to attract commercial credits, towards poorer developing countries. Furthermore, tied aid to the latter group (except for grants and very concessional loans) was henceforth limited to so-called commercially non-viable projects, i.e. for which commercial funding would not normally be available.	
1994	This agreement, concluded in September 1994, generalized the application of the CIRR system for all countries as from September 1995. It also streamlined the classification of countries for maximum repayment terms and reduced the related number of country Categories from three to two; it also refined further the Differentiated Discount Rate. The Package included a mandate for a work programme, which would lead to the adoption of the minimum premium benchmarks in 1997, and gave the go-ahead to redraft the Arrangement – which would be the first redraft since 1991. The Participants' Working Group on Premia and Related Conditions was established.	
1996	After four years' experience with the Helsinki tied aid disciplines, the Participants agreed, in December 1996, to guidelines to assist aid donors and recipients, export credit and Aid agencies and project planners to determine at an early stage whether projects would be eligible for tied aid. The Guidance followed the principle underpinning the Helsinki disciplines that official aid should be avoided for exports which would be commercially viable without concessional financing.	
1997	A revision of the Arrangement, reflecting a complete overhaul of its provisions, was agreed in November 1997, following nearly two years of work in the Redrafting of the Arrangement Group (RAG). The new text incorporated, in a more user-friendly style and format, the decisions and	

	interpretations and the numerous reforms and enhancements to the Arrangement which had been agreed by the Participants since 1992, including the Knaepen Package.	
1998	In 1998, the Participants negotiated disciplines on project finance which allow, under certain conditions, official support for this financing technique to benefit from more flexible repayment conditions. These disciplines were applied first on a trial basis and were subsequently cemented in the Arrangement in 2005.	Australia, Canada, the Czech Republic, the European Community (which includes the following countries: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom) Japan, Korea, New Zealand, Norway, Switzerland and the United States
2002	Sector Understanding, annexed to the Arrangement, was modernized in 2002 in co-ordination with the OECD's Working Party 6 which has responsibility for Shipbuilding issues. The modernized Understanding also set a programme for further work, including on minimum premium benchmarks and other disciplines on minimum interest rates.	Australia, Canada, the Czech Republic, the European Community (which includes the following countries: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom) Japan, Korea, New Zealand, Norway, Switzerland and the United States
2003	A revision of the Ex Ante Guidance on Tied Aid was agreed by the Participants to reflect the further experience gained with the Helsinki Disciplines since the original Guidance was issued in 1996.	Australia, Canada, the Czech Republic, the European Community, Japan,

		Korea, New Zealand, Norway, Switzerland and the United States.
2004	The two amendments to the Arrangement were: • an extension until 30 June 2005 of the Project Finance Understanding in Annex X of the Arrangement and • a new text inserted in Article 9 a) about financing the premium	Australia, Canada, the European Community, Japan, Korea, New Zealand, Norway, Switzerland and the United States
2005	In response, inter alia, to the Johannesburg Summit on Sustainable Development and the Millennium Development Goals, the Participants agreed in 2005 special terms and conditions for renewable energies and water projects which match those available for nuclear power plant. This Sector Understanding was initially applied for a two-year trial period and was extended in 2007 for another two years until the end of June 2009.	Australia, Canada, the European Community, Japan, Korea, New Zealand, Norway, Switzerland and the United States
2008	The major changes are as listed: • the rules on local costs have been modified, for a trial period defined in related footnote 2 [Article 10 d)]. • in some instances support for local cost should be prior notified [Article 45 a) 2)]. • Annex I (Ships): Articles 5 and 7 have been modified, as well as the list of «Future Work» (items d and e). • Annex III (Aircraft): changes have been agreed to Appendix III (Article 11: new footnote 2 establishing accelerated risk-classification procedures for small transactions), Appendix V (clarification of information relating to the buyer/borrower and guarantor) and Appendix VI (amendment to the definition of «Net Price» to exclude import duties and charges).	Australia, Canada, the European Community, Japan, Korea, New Zealand, Norway, Switzerland and the United States.
2009	• A change in the definition of the countries in Category I for maximum repayment term purposes: Category I countries are now defined as High Income OECD Countries; this modification will enable a wider range of countries, including emerging economies, to benefit from ten-year repayment terms instead of a maximum of 8.5 years. • A change to allow a 50% (instead of 35%) share of participation of officially supported export credits in	Australia, Canada, the European Community, Japan, Korea, New Zealand, Norway, Switzerland and the United States

	intra-OECD project finance transactions; this measure is temporary (one year until 31 January 2010) and should contribute to the recovery/stimulus plans announced in many OECD countries. • A change to allow more flexibility in the repayment profile for officially supported export credits in the renewable energies and water sector	
2010	In comparison with the previous text, there has been two amendments: • *Amendment No.1*: In the Sector Understanding on Export Credits for Civil Aircraft, the «de minimis» classification provision has been made permanent by deleting the clause of «trial period» of two years. • *Amendment No.2:* In Annex X of the Arrangement, it was agreed to extend the deadline of the temporary measures as set out in Articles 2 and 3 d) of Annex X, until 31 December 2010.	Australia, Canada, the European Community, Japan, Korea, New Zealand, Norway, Switzerland and the United States.
2011	• In Arrangement Chapter II, new Articles 25 to 32, to update the disciplines on minimum premium rates by introducing new provisions on buyer risk pricing. In Annex I (Ships Sector Understanding), a new Article 10 (former Article 10 d) deleted). • In Annex III (Aircraft Sector Understanding - ASU): • In ASU Appendix II: • A new Article 34 to explain formula used for the calculation of the minimum premium rates. • A new Section 2-II and a new Annex 2, to update the provisions relating to the reduction of minimum premium rates in relation with the impact of the Cape Town Convention on aircraft transactions. • In ASU Appendix IV: • A new Article 1 a) to include Bank Bill Swap Bid Rate (BBSY) as an option for floating rate loans. • A new Article 8 to specify the calculation formula and effective	Australia, Canada, the European Union, Japan, Korea, New Zealand, Norway, Switzerland and the United States.

	date of Market Benchmarks. • In ASU appendix V: • A new definition of Premium Holding Period. • In Annex X (Project Finance Transactions), an update of Footnote 1 to prolong the applications of the provisions in Articles 2 and 3 d) until the end of 2012.	

Sources: The Export Credits Arrangement 1978-2008 Http://Www.OECD.Org/DataOECD/17/24/40594872.Pdf; OECD, Arrangement On Officially supported Export Credits, Tad/Pg(2011)13; Http://Search.OECD.Org/Officialdocuments/Displaydocumentpdf/?Doclanguage=En&Cote=Tad/Pg(2011)13; OECD, Arrangement On Officially Supported Export Credits, Tad/Pg(2011)4,
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ANNEX II					
Year	**Investigating Country**	**Investigation against**	**Product**	**Kind of export credit involve**	**Grant of OECD defense**
1982	United States	Spain	Steel products	Privileged Circuit Exporter Credits	No
1983	United States	Canada	Railcars	Interest Subsidies on Export Credit Financing	No
1983	United States	Italy	Forged Undercarriage Components	Short-Term Preferential Loan Program	No
1986	United States	Brazil	Carbon Steel Products	Short-Term and Long-Term Loans for Both Brazilian Exporters and Foreign Importers of Brazilian Goods	No
1991	United States	Mexico	Textile Mill Products	Short-Term Financing to Producers or Trading Companies Engaged in Export Activities	No
1995	United States	Malaysia	Extruded Rubber Thread	Order-Based and Pre- and Post-Shipment Financing of Exports through Commercial Banks	No
1995	United States	Mexico	Ceramic Tile	Government Program through which Short-Term Financing was Provided to	No

				Producers or Trading Companies Engaged in Export Activities	
1995	United States	Mexico	Porcelain-on-Steel Cooking ware	Short-Term Financing is Provided to Producers or Trading Companies Engaged in Export Activities	No
1996	United States	India	Iron-Metal Castings	Post-Shipment Export Financing and Post-Shipment Credit Denominated in Foreign Currency Program.	No
1997	European Commission	Norway	Atlantic salmon	Guarantee Institute for Export Credits	Yes
1998	United States	Italy	Stainless Steel Wire Rod	Interest Subsidies on Export Credit Financing	No
1999	European Commission	Korea	Stainless Steel Wire having a diameter of 1 mm or more	Medium and Long-Term Loans for Export and Import Transactions by EXIM Bank	No